United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,144

968

FRANK MACKLIN, JR.,

Appellant

v.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM JUDGMENT OF THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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(Appointed By This Court)

STATEMENT OF QUESTION PRESENTED

Appellant by indictment was charged in six counts, the sixth of which read as follows:

"On or about April 9, 1966, within the District of Columbia, Frank Macklin, Jr. willfully and knowingly did possess a firearm; that is, a sawed-off shotgun, having a barrel length of twelve and one-half inches, Serial No. 41521, which had not been registered with the Secretary of the Treasury or his delegate, as required by Section 5841, Title 26, United States Code." (Tr. 36)

Is the fact that an unregistered sawed-off shotgun was found by police under the driver's seat of an automobile being driven by appellant sufficient to sustain a conviction under count six above set forth, in view of the constitutional privilege against self-incrimination contained in the Fifth Amendment of the United States Constitution?

Was the jury confused when the trial Court generally instructed that the failure of the defendant (appellant did not take the witness stand) to take the witness stand was not to be considered in any way detrimental to him (Tr. 316), when coupled with a later instruction in relation to Count six

wherein the Court stated that where it is shown that defendant had in his possession such a firearm, such possession shall be deemed sufficient unless defendant explains the possession to the satisfaction of the jury? (Tr. 328)

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BRIEF FOR APPELLANT FRANK MACKLIN, JR.

ON APPEAL FROM JUDGMENT OF THE UNITED

STATES DISTRICT COURT FOR THE DISTRICT

OF COLUMBIA

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction entered upon a verdict of guilty of violations of Title 22, District of Columbia Code, Sec. 2901, Robbery, of Title 22, District of Columbia Code, Sec. 502, Assault with a Dangerous Weapon, and Title 26 U.S. Code Sec. 5481, illegal possession of sawed-off shotgun.

The District Court had jurisdiction under Title II, District of Columbia Code, Sec. 521. This Court has jurisdiction under the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C. § 1291.

STATEMENT OF THE CASE

An indictment was returned in June of 1966 charging appellant Frank Macklin, Jr. and his son, Herbert Macklin, with robbery and assault with a dangerous weapon, The indictment was in 6 counts. Counts 1 and 3 charged that on April 9, 1966, the two defendants stole property of the K-R Corporation of a value in excess of $2700. Counts 2, 4 and 5 charged that the two defendants, on that date, made an assault with a dangerous weapon, e.c., a sawed-off shotgun, on Rosalind Gertler, Robert L. Gregory, and Bob Gertler. Count 6 charged appellant Frank Macklin, Jr. (but not co-defendant Herbert

Macklin) with possession of an unregistered firearm, e.g., a sawed-off shotgun.

Following denial of motions for suppression of evidence and for a separate trial for each of the defendants, the case went to trial before Judge Walsh and a jury on March 14, 15, and 16, 1967. On the latter date the jury returned a verdict of guilty on the first 5 counts against co-defendant Herbert Macklin and on all 6 counts against this appellant. On May 24, 1967, Judge Walsh sentenced this appellant as follows: On Count 1 - 5-15 years; on Count 2 - 3-10 years; on Count 3 - 5-15 years; on Count 4 - 3-10 years and on Count 5 - 3-10 years, all to run concurrently, and on Count 6 - 18-54 months to run consecutively.

Edward L. Dory, a police officer assigned to plain-clothes duty at the 13th Precinct, testified that on the night of April 9, 1966, he was on duty in a vehicle with Officer Childers and Denham (Tr.159-60). At about 10:05 P.M. they received a radio lookout for a holdup that had occurred at Wilcox Liquors in the 3200 block of Georgia Avenue, N. W. (Tr. 160). Shortly after that they got a description of the car, a Corvair, with 194-6 as the first four numbers of the license plate (Tr. 160-1). While cruising in

the 2000 block of 1st Street, N. W., they observed a car match-the description (Tr.161). This car was heading south and the police car was heading north (Tr.161). The police car made a U-turn, got behind the Corvair and, after noting that the full tag number was 194-674, pulled up to the door of the Corvair (Tr. 161-2). The Corvair then made a U-turn and headed south on 1st Street. Officers Childers and Denham jumped out of the police car and shouted for the other car to stop (Tr. 162). Officer Dory brought the police car to a stop and went over to the Corvair, where Officers Childers and Denham were ordering the occupants out (Tr. 162). Frank Macklin was behind the wheel of the Corvair (Tr. 162-3). Herbert Macklin was on the passenger side on the front seat (Tr. 163), and Donald Brown was sitting in the back seat directly behind the driver. (Tr. 164)

When Officer Dory got to the Corvair, he ordered Herbert Macklin out and began searching him (Tr. 164). At this time Officer Dory noticed that Herbert Macklin had his hand in his pocket and it seemed like a big bulge; and then Herbert Macklin pulled a package out of his pocket (Tr. 164). Officer Childers was holding Brown, who began to scuffle and attempt

to escape (Tr. 164) Appellant began to struggle with Officer Denham and Herbert Macklin began to struggle with Officer Dory (Tr. 164-5). Brown broke loose from Officer Childers and Officer Dory heard a few shots fired (Tr. 165). While Officer Dory was trying to hold Herbert Macklin, money which Herbert Macklin had in his hand began to scatter all over the street (Tr. 165). It was a windy night and the money was blowing under the cars and on the seat and on the ground and down the street (Tr. 165).

While Officer Dory and a detective from the robbery squad were holding Herbert Macklin, Officer Dory noticed the butt of a gun with adhesive tape on it sticking out from under the front seat (Tr. 165-6). On the front seat there were two bottles of whiskey, a fifth of I. W. Harper and a pint of Old Granddad (Tr. 165-6). There was also a lot of change on the front seat (Tr. 166). There was a small 32 caliber pistol, which was loaded, under the front seat (Tr. 166). The money that was scattering all over the place came from Herbert Macklin's hand (Tr. 166). He had previously had it in his left rear pocket (Tr. 166). A number of police officers and a few honest citizens helped pick up the money

which had been scattered (Tr. 170). It was mostly in $5 and $10 bills, with a few $20's (Tr. 171). Approximately $1275 was recovered.

Thurman Darr, Coordinator of the Enforcement Branch of the Alcohol and Tobacco Tax Division of the U. S. Treasury Department, testified that he had examined records in his possession concerning the registration of sawed-off shotguns and that the sawed-off shotgun bearing Serial Number 41521, being the shotgun found by police under the driver's seat of a car being driven by the appellant had not been registered (Tr. 48). Mr. Darr testified that the barrel length of said shotgun was 12½ inches long.

Robert L. Gregory testified that he was employed as a clerk and delivery man by the Wilcox Liquor Store located at 3225 Georgia Avenue, N. W. in the District of Columbia (Tr. 51-52); that on April 9, 1966, as he was making deliveries, he noticed a red Corvair car with three persons in it parked in front of the store around 7:30 or 8 o'clock that evening (Tr. 53); that upon his return from a delivery between 8:30 and 9 that evening he noticed that the same car was parked in the alley toward the rear of the store, with one person sitting in it

on the passenger side in the front seat (Tr. 53-54); that he became suspicious and was about to jot down the numbers on the license plate but, not having a pencil, he remembered the first four digits which were 194-6 (Tr. 53); that as he was going into the store he noticed two men in the phone booth just outside the store (Tr. 54); and that very soon thereafter the same two men came into the store (Tr. 54). Gregory then noticed that one of the men, who was wearing a greenish coat, had a pistol, so he started out of the store to reach the phone (Tr. 55). As he did so the other man, who was wearing a light colored coat, showed Gregory a shotgun and said, "If you want to be smart, you will come on back in." (Tr. 55) Gregory came back into the store and was directed by the man with the shotgun to go to the rear of the store where the money in his possession was taken from him and he was told to lie down (Tr. 55). A total of $45 or $50 was taken from him (Tr. 58).

Not too long thereafter, Gregory's boss and his wife were brought to the rear of the store and one of the two men said to Gregory, "I ought to kill you for being so smart." (Tr. 55-56). Gregory's boss pleaded with the gunman not to hurt Gregory (Tr. 56-57).

Gregory identified Frank M. Macklin, Jr. as the man with the shotgun (Tr. 59-60). He stated positively that co-defendant Herbert Macklin was not the man with the pistol (Tr. 60), and identified a picture (Government Exhibit No. 2) as that of the man who had the pistol (Tr. 61)

Gregory testified that he did not see the face of the third man in the car and that the only thing he noticed about this man's clothing was that he had on a light shirt or coat (Tr. 57-58). When Gregory observed the car parked to the rear of the store, this third man was sitting on the passenger side in the front seat (Tr. 54). He noticed that there were some clothes or something hanging on one of the sides of the car, like it had just come from the cleaners (Tr. 58).

Gregory testified that the day after the robbery he identified Frank Macklin, Jr. in a police lineup as one of the holdup men and later identified the man with the pistol in the morgue (Tr. 63-64). On cross-examination, Gregory testified that he could only see the back of the head of the man who was sitting in the car when it was parked at the rear of the store (Tr. 91). He couldn't tell whether

it was a man or a boy (Tr. 121-2). He has never identified Herbert Macklin as being present at the robbery (Tr. 122).

Robert Gertler, a co-owner of the K-R Corporation which operates the Wilcox Liquor Store, testified that at about 10P.M. on Saturday, April 9, 1966, while he was busy filling out his cigarette order, he heard someone say to his wife, "Give me all your money" (Tr. 130-2). He turned around and saw somebody leaping across the counter with a revolver in his hand (Tr. 132). The man told Gertler to walk alongside of him and made Gertler's wife take all of the money out of the safe and give it to him (Tr. 132). The man stuffed the money into his pockets (Tr. 132). He then told Gertler and his wife to get into the back room, where Gertler saw Gregory lying face down on the floor (Tr. 132-3). The man with the revolver pointed it at Gregory's head and said, "I should take care of you" (Tr. 133). Gertler pleaded with him not to.

Shortly after the two men left Gertler called the police, who arrived in a matter of minutes (Tr. 133-34). Gertler saw the man with the shotgun standing near the refrigerator which was toward the back of the store (Tr. 134). He identi-

fied appellant, Frank Macklin, Jr., as the man with the shotgun (Tr. 139-40). He also identified a picture (Government Exhibit No. 2) as that of the man with the revolver (Tr. 138). He hestified that about $2600 in cash was taken from the store, together with two bottles of whiskey which he was able to identify because the store's stamp was on the bottles (Tr. 136-8).

He never saw co-defendant, Herbert Macklin in the store (Tr. 140).

Appellant did not take the witness stand in his own behalf.

STATUTES, TREATIES, REGULATIONS OR RULES INVOLVED

22 D. C. Code § 2901. Robbery.

Whoever by force or violance, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months or more than fifteen years.

22 D. C. Code § 502. Assault with Intent To Commit Mayhem Or With Dangerous Weapon.

Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 26, United States Code, Sec. 5851.

It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5841, or 5846, or which has at any time been made in violation of section 5841, or to possess any firearm which has not been registered as required by section 5841. Whenever

on trial for a violation of this section, the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

Chapter 26 United States Code Section 5848 (1)

The term "firearm" means a shotgun having a barrel or barrels of less than 18 inches in length, or a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive, if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition.

Chapter 26 United States Code Section 5848 (4)

The term "shotgun," means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to

use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each pull of the trigger.

Title 26 United States Code Section 5861 - Penalties

Any person who violates or fails to comply with any of the requirements of this chapter shall, upon conviction, be fined not more than $2,000.00 or be imprisoned for not more than five years, or both, in the discretion of the Court.

STATEMENT OF POINTS

1. Since the record is barren of any evidence on which a finding of waiver of the privilege of self-incrimination might properly be predicated and since, absent such a waiver, reversal of the conviction of appellant on count six should follow.

SUMMARY OF ARGUMENT

The U. S. Supreme Court in three cases decided January 29, 1968, all of whom were interrelated as to the question involved and as to the majority opinion and concurring opinions and dissenting opinion, in substance held that to require a person to register with the Secretary of the Treasury a sawed-off shotgun was tantamount to self-incrimination.

Appellant herein was sentenced to serve indeterminate terms ranging between three to fifteen years on counts one through five, to run concurrently and a further term of 18 months to 54 months on count six to run consecutively. To permit the conviction under count six to stand has the effect of adding time to the sentence appellant must serve.

ARGUMENT

Haynes v. United States, 389 U.S. _____ S.Ct. 722 (1968)

In Haynes v. U.S. petitioner was charged by a three count information filed in the United States District Court for the Northern District of Texas with violations of the National Firearms Act 48 Stat. 1237. Two of the counts were subsequently dismissed upon Motion of the United States attorney. The remaining count averred that petitioner, in violation of 26 U.S.C. Section 5851, knowingly possessed a firearm as defined by 26 U.S.C. Section 5841(1), which had not been registered with the Secretary of the Treasury or his delegate, as required by 26 U.S.C. Section 5841. Petitioner moved before trial to dismiss this count, evidently asserting that Section 5851 violated his privilege against self-incrimination, as guaranteed by the Fifth Amendment. The motion was denied, and petitioner thereupon entered a plea of guilty. After the Court of Appeals for the Fifth Circuit affirmed the judgment of conviction, the U. S. Supreme Court granted ceriorari 388 U.S. 908.

On January 29, 1968, the Supreme Court reversed the finding of conviction.

Marchetti v. United States, 88 S.Ct. 697 (1968)

In Marchetti v. United States decided on the same day and referred to in Haynes v. U.S., the petitioner therein was convicted in the United States District Court for the District of Connecticut under two indictments which charged violations of the federal wagering tax statutes. The second indictment included two counts: The first alleged a willful failure to pay the occupational tax; the second, a willful failure to register, as required by 26 U.S.C. 4412, before engaging in the business of accepting wagers.

After verdict, petitioner unsuccessfully sought to arrest judgment, in part on the basis that the

statutory obligations to register and to pay the occupational tax violated his Fifth Amendment privilege against self-incrimination. The Court of Appeals for the Second Circuit affirmed (352 F.2d848). The Supreme Court granted certiorari to re-examine the constitutionality under the Fifth Amendment of the pertinent provisions of the wagering tax statutes and more particularly to consider whether U.S. v. Kabriger 345 U.S. 22 and Lewis v. U. S. 348 U.S. 419 still have vitality. After consideration the Supreme Court reversed the judgment of conviction.

Grosso v. United States 389 U.S. ____ 88 S.Ct. 709

On the same day Justice Harlan of the Supreme Court, in reversing a judgment of conviction for willful failure to pay excise tax imposed on wagering by federal statute and related violations in Grosso, wrote:

"Since the record is barren of any evidence on which a finding of waiver of the privilege against self-incrimination might properly be predicated, and since, absent such a waiver, reversal of the conviction would be inevitable in light of our holdings today in this case and in Marchetti, we consider that the entire case should now be finally disposed of at this level. .....Accordingly, the judgment of the Court of Appeals is reversed in its entirety." (Emphasis supplied)

In the Haynes case Justice Harlan wrote:

(12) "We hold that a proper claim of the constitutional privilege against self-incrimination provides a full defense to prosectuions either for failure to register a firearm under section 5841 or for possession of an unregistered firearm under section 5851."

While the record does not disclose that appellant herein in the trial raised the question of constitutionality of the National Firearms Act under which he had been charged in Count 6 of the indictment, there is nothing in the record on which a finding of waiver of the privilege against self-incrimination might be properly predicated.

In Grosso it appears that the question of constitutionality of the federal wagering tax statutes was first raised after conviction.

CONCLUSION

For the reasons stated, the conviction of appellant under Count 6 of the indictment should be reversed with directions to enter a judgment of acquittal.

Respectfully submitted,

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By Appointment of this Court